IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

BROWN & WILLIAMSON TOBACCO CORPORATION, LIGGETT & MYERS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO COMPANY and THE AMERICAN TOBACCO COMPANY,

Petitioners,

v.

HELLENIC LINES LIMITED, respondent and claimant of the S. S. "ANGHYRA", her engines, boilers, etc., and WEST OF ENGLAND SHIPOWNERS PROTECTION & INDEMNITY ASSOCIATION, LIMITED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review that part of its judgment, entered on March 23, 1960 which reverses the judgment of the United States District Court for the Eastern District of Virginia, at Norfolk and the order denying a petition for rehearing dated May 24, 1960 and entered May 30, 1960.

Opinion Below

The opinion of the United States Court of Appeals is reported in 277 F. 2d 9. The opinion of the District Court (A 31)* is reported in 157 F. Supp. 737. The supplemental memorandum on rehearing in the District Court (A 34) is unreported.

Jurisdiction of This Court

The judgment of the United States Court of Appeals is dated March 23, 1960 and was entered on the same day. Rehearing was denied by order dated May 24, 1960 and entered May 30, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. A. Sec. 1254(1) and Article III, Section 2, of the Constitution.

Questions Presented

1. Does not the omission of electric ventilation constitute negligence in care of cargo, not management of the vessel under the Carriage of Goods by Sea Act, 46 U. S. C. A. 1303, 1304?

2. May a Court of Appeals, in a non-jury case, reverse the District Court by making a finding of fact directly contrary to the testimony of the sole witness to the fact, whose testimony the District Court accepted, merely because the witness testified by deposition? (*McAllister* v. *United States*, 348 U. S. 19.)

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* The letter "A" is used to designate the "Appendix to Brief for Appellants" (white cover) filed in the Court below; the letters "AA" are used to indicate the "Appendix to Briefs for All Appellees" (blue cover) filed in that Court.

3. May a Court of Appeals both refuse to decide an issue and refuse to instruct the District Court to do so, when its new findings of fact and conclusions of law make such action necessary for a full and complete determination of the case?

4. When a Court of Appeals makes a new finding of fact which entitles litigants to a remedy under the pleadings, may it refuse to grant the remedy or to instruct the District Court to do so?

Statutes Involved

46 U. S. Code §1303. Responsibilities and liabilities of carrier and ship—Seaworthiness

"(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

Cargo

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

* * *

§1304. Rights and immunities of carrier and ship—Unseaworthiness

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Uncontrollable causes of loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

* * *

(c) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

* * *

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

* * *

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

* * *

Statement of the Case

Jurisdiction of United States District Court

These suits were instituted in admiralty in the United States District Court by petitioners to recover for damage to shipments of tobacco. The basis for the District Court's jurisdiction was 28 U. S. C. A. 1333(1).

Material Facts

Petitioners are American manufacturers of various brands of tobaccos and cigarettes. They became owners of over sixty thousand bales of tobacco in December, 1940, at the time they were loaded aboard the S. S. "Anghyra" at ports in Bulgaria, Greece and Turkey for carriage to United States ports. Respondents are the owner of that vessel and the owner's liability indemnitor.

World War II had been in progress for more than one year and the Greek-Italian War for more than one month before the tobacco was loaded, making it inevitable to respondents' knowledge that the cargo would be carried on the 13,000 mile Suez-Cape of Good Hope route instead of the 5,000 mile Mediterranean-Gibraltar route; yet the only additional precaution taken in stowing the cargo for the long, hot voyage via Suez, with the probability of delays resulting from convoys and other causes, was to leave a space one foot square beneath each ventilator, extending down through the tobacco which, in the lower holds, was stowed 18 to 22 tiers high.

The shipowner's general manager instructed the master that it was necessary to operate the electric forced ventilation facilities of the ship continuously to insure the discharge of the cargo in good condition. The local shippers approved the electric ventilation provided it was kept in constant operation.

The ship arrived at Port Said with electric ventilation in use 24 hours a day and this continued for the next two nights and days. On the second day, a local officer of the British Admiralty told the master that a light had been observed the previous night in violation of blackout regulations at the port prohibiting lights being shown from five p. m. to seven a. m. The ship's officers thought any such light must have come from the crew's quarters. The master, when he returned from the Admiralty office, ordered the dynamos cut off at night.

On the "Anghyra", current to operate both the lights and the electric ventilation was furnished by

dynamos. Between the dynamos and the lights and fans were five electric switches, each controlling a circuit. Three circuits actuated both lights and fans; the other two actuated lights and the radio. It was necessary to pull only one switch to darken the crew's quarters which would have kept the electric ventilation in operation. In choosing to stop the dynamos the master deprived the cargo of essential ventilation, thereby causing extensive damage. The District Court held this to be negligence in the care of cargo. The Court of Appeals reversed, excusing the ship on the ground that the master was ordered to cut off the dynamos, that this was a voluntary sacrifice of part of the cargo in order to preserve the venture as a whole, and concluding that his action was negligence in the management of the ship which was excused under the Carriage of Goods by Sea Act.

The master explained his action in a deposition taken at Norfolk on July 14, 1941 in which he testified as to numerous orders and instructions he had received from the British authorities in Greece and Port Said but said nothing about suggestions, instructions or orders to shut off the dynamos. He said he was told that if any light was shown again the British Authorities "would shoot him from the batteries." In testimony given two days later, when asked what the Naval authorities at Port Said had told him, he again said nothing about suggestions, instructions or orders to shut off the dynamos, nor did he do so twelve days later when asked for the third time.

Only when asked another question on the twelfth day did the master, in the course of a rambling answer, add that the officers "told me, cut off this dy-

namo and be quiet about this and avoid trouble"; which he later admitted was a mere suggestion. Although he observed that "even suggestions are orders from the officers" his next words admitted that such was not the case in this instance. He said "That was not orders to shut off the dynamos". The District Court agreed that "The British Admiralty did not order that the dynamo be cut off" and in fact made no finding that the Admiralty had so much as made a suggestion.

In corroboration of the finding of the District Court and the testimony of the master, it is significant to note that not only were the dynamos inoperative for nine successive nights at Port Said but they were also shut down at the later ports of Suez and Port Sudan as to which there was no evidence of suggestions or orders of the port authorities. In all there was a total of at least 196 night time hours, 168 of them consecutive night hours, in which the tobacco received no electric ventilation. At three subsequent ports the dynamos were likewise shut down for additional periods.

The Court of Appeals reversed that portion of the interlocutory decree which allowed recovery for the heat damage.

Petitioners filed a petition for rehearing asking the Court below to affirm the District Court, or alternatively to remand and instruct the latter to make specific findings as to the propriety of the stowage for the voyage, or to ascertain the sums due petitioners from respondents as contributions in general average

for the sacrifice of the cargo. Alternatively, it asked the Court to modify its findings so as to hold respondents liable for heat damage resulting from omission of electric ventilation subsequent to the first night of such omission at Port Said, and to hold respondents liable for the damage resulting from such omission at subsequent ports. The petition was denied without opinion.

Reasons for Granting the Writ

As to Questions 1 and 2, supra p. 2, the decision of the Court below conflicts with applicable decisions of this Court and conflicts with decisions of the United States Courts of Appeals for other circuits.

As to Questions 3 and 4, supra p. 3, the decision of the Court below so far departs from the usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

I

The omission of electric ventilation constituted negligence in the care of the cargo, not an error in the management of the vessel.

The decision of the Court below to the contrary is in conflict with the decision of this Court in *The Vallescura*, 293 U. S. 296, and with the decision of the Court of Appeals for the Second Circuit in *Armour & Co. v. Cia. Arg. De Nav. Dodero, S. A.*, 263 F. 2d 323, affirming 1958 A. M. C. 332 (not officially reported) as well as decisions of Courts of Appeals of other circuits, cited below.

The question involved is of great importance in the field of Maritime Law. It affects all cases involving the carriage on cargo vessels of perishable commodities requiring either ventilation or refrigeration for their safe carriage. The trade of shipping perishable and semi-perishable commodities has grown constantly in volume until it has become a most important part of ocean commerce. For the purpose of properly discharging the duties involved in such transportation, vessels provided with electric ventilating or refrigerating apparatus have been put in service and compete with others for this branch of the carrying trade. Apparatus for the preservation and safe carriage of perishable vegetable commodities (such as, e. g., "Cargocaire") has been and is being installed in increasing volume on ocean vessels, and suits involving its mishandling or failure are becoming increasingly numerous.

The "Anghyra" was loaded and stowed with tobacco, a perishable vegetable cargo, in December, 1940 and January, 1941, in contemplation of a voyage requiring two crossings of the Equator. Respondents conceded and both Courts below found that tobacco required all available ventilation on such a voyage if heating damage was to be avoided. (A 17, AA 306a, app.* 6, 8, 12)

The facilities available for ventilating the cargo included electric fans in two of the ventilators serving each of the cargo compartments (three in #2 hold), one to draw fresh air into the compartment, and the other to extract stale air. Respondent's general manager testified that he expected their operation to overcome the heat and humidity contemplated on the voyage; and he instructed the master by letter before the voyage:

> "It is *necessary* to use *continuously* the electric ventilation of the holds of your vessel, so that the tobacco will arrive in good condition." (Emphasis supplied.)

At Port Said, the master was told by a local British Admiralty officer that a light had been seen on the "Anghyra" in violation of the port's blackout regulations and that it must not happen again. He chose to prevent a further showing of lights by rendering the ship's dynamos inoperative, which not only extinguished all lights but also stopped the electric ventilation of the cargo.

The District Court found that during the daylight hours the fans in the ventilators pumped hot air into

* "app." refers to the appendix to this petition.

the holds, building up the temperature there; and that at night, being inoperative, they failed to replace this with the cooler night air. It further found that the presence of the inoperative fans in the ventilators obstructed the passage of air through them. It concluded that the cessation of the electric ventilation "at least planted the seeds of damage" to the cargo. The Court of Appeals accepted this finding but concluded that the master's action in shutting off the electric ventilation was an error in the ship's management, excused by the Carriage of Goods by Sea Act.

This holding of the Court of Appeals is in conflict with the decision of this Court in *The Vallescura*, 293 U. S. 296. In that case Spanish onions, a perishable vegetable cargo, were damaged by decay on a voyage from Spain to New York. The decay resulted from failure to ventilate the cargo. The failure was due in part to closing of hatches and ventilators made necessary by heavy weather, and in part to negligent failure of the carrier to keep them open at night in fair weather. This Court held (at p. 303):

> "The failure to ventilate the cargo was not a 'fault or error in navigation or management' of the vessel, from the consequences of which it may be relieved by § 3 of the Harter Act * * *. The management was of the cargo, within the meaning of §§ 1 and 2 of the Act, and not of the vessel, to which § 3 relates. *The Germanic*, 196 U. S. 589, 597; *Knott* v. *Botany Mills*, 179 U. S. 69, 73, 74; *The Jean Bart*, 197 Fed. 1002, 1006 (D. C.)".

The decision of the Court of Appeals is also in conflict with the decision of the Court of Appeals for the

Second Circuit in *Armour & Co.* v. *Cia. Argentina De Nav. Dodero, S. A.*, 1958 A. M. C. 332, affirmed 263 F. 2d 323. There, canned goods shipped at Buenos Aires for carriage to New Orleans and Houston were damaged by sweat. The vessel left Buenos Aires in winter weather and proceeded north into warmer, more humid weather. The hold in which the cargo was stowed had three ventilators. One of them was equipped with a "forced draft intake," the other two being natural draft exhaust ventilators. All were kept in continuous operation throughout the voyage. This the District Court found negligent; and it held as a conclusion of law that it was "negligent failure of the respondent properly and carefully to * * * care for the said cargo."

Thus the Second Circuit Court of Appeals holds that negligent operation of an electric ventilator is negligence in care of the cargo; while the Court of Appeals for the Fourth Circuit holds that it is an error in management of the vessel.

This decision also is in conflict with the Second Circuit in *The Asturias*, (S. D. N. Y. 1941) 40 F. Supp. 168, aff'd 126 F. 2d 999 (1942), where the ship was insufficiently ventilated, the shipper had made a special request with respect to ventilation and the vessel's evidence had failed to convince the District Judge that the ventilation had been properly attended to.

This decision also is in conflict with the Second Circuit in *The New York* 29 F. 2d 26 (1928), where the ship omitted to draw water out of CO_2 flasks before connecting with the refrigerating plant causing a shipment of pears to become heated and decayed.

This decision also is in conflict with the Second Circuit in *The Naples Maru*, 106 F. 2d 32 (1939), where the court condemned the master's failure to use the cowls for the ventilators and said:

> "Plainly the fault concerned; not the 'management' of the ship, but 'the care and custody' of the cargo."

See also: *The Samland*, 7 F. 2d 155 (S. D. N. Y.)

This decision is in conflict with the Ninth Circuit in *The Skipton Castle*, 243 Fed. 523 (1917), where cargo was damaged by omitting "to let out all the hot air possible from the lower hold * * *. * * * The navigation of the ship was not affected by the failure to raise the cargo stowed on the hatch and to put it on the deck and dry it there, closing the hatch and then replacing the cargo and while doubtless the removal of the upper hatch boards to get the cargo out and the pulling of canvas or additional hatch boards under the cargo in the lower hatch pertained to the management of the ship in an incidental sense, yet the primary purpose would be care of cargo threatened with injury from heat below." (525, 526)

See also: *Spencer Kellogg & Sons* v. *Great Lakes Transit Corp.* (E. D. Mich.), 32 F. Supp. 520, where a water line which served the men in the deckhouse was suspended under the weather deck between two hatches. The officers and crew failed to turn off the line which as a result froze, burst and damaged the cargo. The Court held this was not a fault in the management of the ship.

This decision is in conflict with the House of Lords in *Gosse Millerd Ld.* v. *Canadian Govt. Merchant*

Marine (1929) A. C. 223 affirming the Kings Bench (1927) 2 K. B. 432, in which a ship had sustained collision damage while leaving port and had been held up for repairs. In making the repairs it was necessary to leave the hatches open and rain caused rust damage to a cargo of tinplates. The House of Lords held that the negligence was in the care of the cargo and not in the management of the ship and that the shipowner was liable (reversing the Court of Appeal, (1928) 1 K. B. 717, which had held that the object of leaving the hatches open was to repair the ship for the voyage and an act of management of the ship).

See also: *Foremans and Ellams, Ld. v. Federal Steam Navigation Co.*, (1928) 2 K. B. 424, holding that the negligent handling of a ship's refrigeration machinery is not an act of ship management.

The territorial jurisdiction of the Courts of Appeal whose decisions are in conflict comprises some of the busiest ports in the United States—New York, San Francisco, Los Angeles, Portland and Seattle on the one hand, and Baltimore and Norfolk on the other. It is obviously undesirable that a question of such frequent recurrence and increasing importance should be governed by different rules in the Courts of three such circuits. The substantive rights of shippers and carriers under an Act of Congress, which implements an international convention on the subject—the International Convention for the Unification of Certain Rules Relating to Bills of Lading, 51 Stat. 233, should not be dependent upon the choice of the circuit in which suit is commenced.

II

In a non-jury case, a Court of Appeals may not reverse the judgment of the District Court by making a finding of fact directly contrary to the testimony of the sole witness to that fact, whose testimony the District Court accepted, merely because the witness testified by deposition.

The decision of the Court below is in conflict with the decision of this Court in *McAllister* v. *United States*, 348 U. S. 19, 20, 23 and with the decisions in admiralty cases of the Court of Appeals for the First Circuit in *The Texas Company* v. *R. O'Brien & Co., Inc.*, 242 F. 2d 526, 529 (1957), the Court of Appeals for the Fifth Circuit in *Panama Canal Co.* v. *Sociedad De Transportes Maritimos, S. A.*, 272 F. 2d 726, 731 (1959) and the Court of Appeals for the Ninth Circuit in *Titus* v. *S. S. Santorini*, 258 F. 2d 352 (1958). It is also in conflict with the decision of this Court in *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394 (1948) decided under Rule 52(a) of the Rules of Civil Procedure (cited by this Court in the *McAllister* case), and with decisions of several circuits, noted infra, in other cases governed by Rule 52(a). The territorial jurisdiction of the Courts of Appeal with which the decision below is in conflict comprises most of the United States.

The finding of the District Court which the Court below considered crucial and which it reversed was: "The British Admiralty did not order that the dynamo be cut off." The only witness with knowledge

of what was said at the Port Said Naval Office is the master. He testified that the officer's suggestion that the dynamos might be shut off was *not* an order. (A.A. 86a) Respondents' counsel *agreed* it was not. (A 301) The District Court *found* it was not. (A 17) There is *no* evidence that it was. No one but the Court of Appeals has said that it was. The Court of Appeals did not hold that the findings of the District Judge were "clearly erroneous." On the contrary it said that it differed with him only as to the ultimate inference to be drawn from the evidence; namely whether the "suggestion" was an "order". It found:

> "That is what the Admiralty suggested, and * * * the captain * * * took the suggestion as an order."

In a footnote, that Court added:

> "[3] Our statement of the facts is taken, largely, from the findings of the District Court. We differ with him only as to the ultimate inference to be drawn from the evidentiary facts; that is, whether, under the circumstances, the 'suggestion' of the Admiralty was an order with which the captain reasonably felt compelled to comply. It is appropriate to add, however, that the evidence about the incident is in depositions, and that the scope of review of findings of fact is not as narrow as it would be if the District Court had seen and heard the witnesses. *The Archbridge*, *United States* v. *Williams S. S. Co.*, 1 Cir., 42 F. 2d 971; *The Standale*, 1 Cir., 94 Fed. 345; *Cogh Lines* v. *United States*, 7 Cir., 195 F. 2d 737; *Waterman S. S. Corp.* v. *United States Shipping Board & Merchant Co.*, 5 Cir., 155 F. 2d 687; *The W. W. Bates*, *Bay Wood Lumber Timber Co.* v.

Continental S. S. Co., 2 Cir., 94 F. 2d 834; *The Kalfarli*, 2 Cir., 277 Fed. 391."*

The scope of review by the Court of Appeals in a non-jury case, under the decision of this Court in the *McAllister* case, is neither widened nor constricted by the fact that the evidence was given by deposition. In either case, the test remains the same: Was the judgment of the trial court clearly erroneous? And in either case, the test remains the same: In order to hold that a finding is clearly erroneous, the reviewing Court on the entire evidence must be left with the definite and firm conviction that a mistake has been committed.

In applying this test, the powers of the Court of Appeals are not unlimited. The mistake must be so clear and convincing that a reasonable man could not

* All six of the cases cited by the Court of Appeals were decided prior to the decision of this Court in *McAllister* v. *U. S.*, supra.

In *The Ambrabp*, the decision of the District Court was affirmed. In *The Sappho*, it was reversed purely as a matter of law applied to the admitted facts. In *Cogle Lines* v. *U. S.*, the Court denied a motion to vacate an I. C. C. order because the order was supported by substantial evidence. In *Waterman S. S. Corp.* v. *U. S. S. R. & M. Co.*, the Court expressly found "An appeal in admiralty is a trial de novo, and the findings of fact made by the court below are not binding on this Court" — a rule repudiated by this Court in the *McAllister* case. In the *W. W. Bruce* the Court said "On this appeal our opportunity to determine the crucial facts is equal to his" — an adherence to the same repudiated rule. *The Kalfarli* illustrates the same error.

None of the six cases is any longer the law in its its own Circuit. The first two cases are in conflict with the later decision of the Court below in *Spanos* v. *The Lola*, 261 F. 2d 214; the two Fifth Circuit cases are governed by *C. J. Dick Towing Co.* v. *Tug Lee*, 202 F. 2d 854. (where much testimony was given by deposition) cited by this Court in the *McAllister* case and by the 1950 decision of the Fifth Circuit *Panama Canal Co.* v. *Sociedad De Transportes Mexicanos S. A.*, supra, in which deposition testimony was involved; and the two Second Circuit cases are overruled by *Union Carbide & Carbon Co.* v. *U. S.*, 200 F. 2d 905, as noted by this Court in the *McAllister* case.

possibly have made the finding. If the mistake concerns conflicting evidence which permits of alternative inconsistent inferences the Court of Appeals cannot substitute its inference for the one drawn by the District Court. Finally, if the finding faithfully incorporates the sole evidence on the matter, it is based not on inference but exclusively on fact and, consequently, there is neither the necessity nor propriety of the appellate court resorting to inference or presumption, and the appellate court has no power to do so.

The "ultimate inference" which the Court below drew, is as to the captain's state of mind. He was certainly the only one who could know that. He testified that the suggestion was *not* an order. Respondents' counsel *agreed* it was not. The District Court *found* it was not. There is *no* evidence that it was. Yet the Court of Appeals has rejected this the *only* evidence on the matter, and found the contrary.

In *McAllister* v. *United States*, 348 U. S. 19, 20, 22, 23 (1954), reversing 207 F. 2d 952, this Court held that the scope of review in an admiralty case is no greater than in a civil case under Rule 52(a) of the Rules of Civil Procedure. It stated there that "the Court of Appeals may not set aside the judgment below unless it is clearly erroneous." Of a District Court finding based on inferences supported by expert medical testimony, it said: "Certainly we cannot say on review that a judgment based upon such evidence is clearly erroneous. *Myers* v. *Reading Co.*, 331 U. S. 477, 485-486; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29." The Court of Appeals had held that since contrary permissible inferences might be drawn, it was free to substitute its own judgment.

The decision of the Court of Appeals is also in conflict with the decision of this Court in *United States v. United States Gypsum Co.*, 333 U. S. 364, 394 (1948) cited by this Court in the *McAllister* case. In that civil anti-trust case this Court said:

> "In so far as this finding and others to which we shall refer are inferences drawn from documents or undisputed facts, heretofore described or set out, Rule 52 (a) of the Rules of Civil Procedure is applicable."

The decision is also in conflict with the decision of the Court of Appeals for the First Circuit in *The Texas Company v. R. O'Brien & Co., Inc.*, 242 F. 2d 526, 529 (1957), where, in reviewing a final decree on damages, the Court said:

> "The present admiralty rule is that findings are not to be reversed unless 'clearly erroneous' comparable to Fed. Rules Civ. Proc. rule 52 (a), 28 U. S. C. A., McAllister v. United States, 1954, 348 U. S. 19, 75 S. Ct. 6, 99 L. Ed. 20. * * *. In our opinion Rule 52 (a) unambiguously governs all findings, and its additional caveat, that due regard is to be given to the trial court's opportunity to judge credibility, is merely cautionary advice, not a variation in the scope of review. Cf. Galena Oaks Corp. vs. Scofield, 218 F. (2d) 217 (5 CA. 1954). We do not think the substantive test, and possible success, on appeal whatever the nature of the case, should depend upon whether the evidence at the trial had been stipulated or contested."

This decision is also in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Panama Canal Co. v. Sociedad De Transportes Maritimos,*

S. A., 272 F. 2d 726, 731 (1959), where one or more depositions were involved. The Court, on conflicting evidence, said: "However, giving the evidence as a whole the construction most favorable to the decree, as this Court is compelled to do, we cannot say that the findings of the trial judge are clearly erroneous. Our review of this case is circumscribed by Rule 52 (a), Fed. Rules Civ. Proc. 28 U. S. C. A. *McAllister v. United States*, 1954, 348 U. S. 19, 75 S. Ct. 6, 99 L. Ed. 20; *Argentina-Antinous*, 5 Cir., 1958, 259 F. 2d 11, 1958 A. M. C. 2070."

The decision below is also in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Titus v. S.S. Santorini*, 258 F. 2d 352 (1958) where a longshoreman had been injured during loading of cargo when a rope broke. Various causes were assigned. The District Court held against libellant. The Court of Appeals was urged to draw its own inferences from the facts as found, as it had held it might properly do in *Petterson v. Alaska S.S. Co.*, 205 F. 2d 478 (1953). The Court of Appeals, in affirming, held that the practice it once followed in the *Petterson* case "by McAllister is no longer permitted" and that it could only "examine the facts to determine if the ruling (of the District Court) was clearly erroneous".

The decision below is also in conflict with numerous decisions in other circuits in civil actions under Rule 52 (a) of the Rules of Civil Procedure. Some of these are noted below.*

* First Circuit

Collins v. C. I. R., 216 F. 2d 519, 522 (1954), where, in affirming, the Court said: "Even where all material facts are stipulated, as in this case, a finding of fact made by the Tax Court based on a reasonable inference from such stipulated facts

Even if it were held that the Court of Appeals properly inferred that the Admiralty Officer at Port Said ordered that the dynamos be cut off at that port, there is not a scintilla of evidence that the "order" was effective at subsequent ports. If any

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will not be set aside upon review even though this court could possibly draw a different inference."

Second Circuit

Albino v. C. I. R., 273 F. 2d 450, 451 (1960). The taxpayer had testified that the figure reported in his return was probably the best figure to take. The reviewing Court said: "We certainly cannot hold that the Tax Court's acceptance of this figure was clearly erroneous".

Fifth Circuit

Campbell v. Barsky, 265 F. 2d 463, 466 (1959), which states: "For us to overrule them (the findings) requires that we hold as a matter of law either that reasonable men could not possibly make such a finding, or that the result leaves us with a conviction that an injustice has been done".

Tennessee Coal, Iron & R. Co. v. Muscoda Local, 137 F. 2d 176, 180, 184, 185 (1943), affd. 321 U. S. 590, which states: "Even where there is no dispute about the facts, if different reasonable inferences may fairly be drawn from the evidence, an appellate court is forbidden to disturb the findings based on such inferences unless they are clearly erroneous. * * * Any other construction of the rule would be equivalent to holding that a reasonable inference from undisputed facts was clearly erroneous, which would be reducing the matter to an absurdity".

Sixth Circuit

Rich v. Pappas, 229 F. 2d 308, 313 (1956) where the Court said: "The District Judge was authorized to draw all reasonable inferences from these uncontradicted facts. Such inferences unless clearly erroneous are controlling on this review. *United States v. United States Gypsum Co.*, 333 U. S. 364, 394, 68 S. Ct. 525, 92 L. Ed. 746;"

C. I. R. v. Cons. Prom. Iron Ores, Ltd., 265 F. 2d 320, 326, 327 (1959) where, in affirming, the Court said: "* * * the facts found by the Tax Court and the inferences and conclusions drawn therefrom are controlling on this review unless clearly erroneous. * * * we conclude that the inferences and conclusions drawn from the undisputed facts are not clearly erroneous. We do not, therefore, attempt to substitute our judgment of ours for that of the trial judge."

J. W. Bateson Co. v. Romano, 266 F. 2d 340 (1959), where a subcontract did not specifically require removal of material not fit for a fill and where accordingly, the trial court's

inference is permitted to be drawn, it should be that the dynamos were not ordered to be cut off at any subsequent ports, thereby at least partially supporting the finding of the District Court. *Gary Theatre Co. v. Columbia Pictures Corp.* (see note below). This position was pressed vigorously in the petition for rearguument which was denied without comment.

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finding that the subcontractors were not required to remove the material could not be said to be clearly erroneous.

Seventh Circuit

Zeddies v. *C. I. R.*, 264 F. 2d 120, 126 (1959), cert. den. 360 U. S. 910, reh. den. 361 U. S. 855, holding that it is for the trial court to weigh the evidence, draw inferences and declare the result and that the reviewing court's only function is to see whether substantial evidence supports the findings.

Hystir Co. v. *Hunt Foods, Inc.*, 263 F. 2d 130, 133 (1959), and *Insurance Co. of North America* v. *Macopa Dredging & B. Co.*, 262 F. 2d 916 (1959), holding that the reviewing court has no right to substitute its judgment and that whether it would have reached the same result had it been the initial tryer is immaterial.

Gary Theatre Co. v. *Columbia Pictures Corp.*, 120 F. 2d 891, 895 (1941), where, in affirming a civil anti-trust judgment for the defendant, the Court stated: "To determine the question in favor of plaintiff would necessitate substitution of our judgment upon facts for that of the trial court: • • • This we do not believe we are justified in doing." The Court held further that where proven facts give equal support to two inconsistent inferences, neither being established, judgment must go against the party upon whom rests the necessity of sustaining one of these inferences against the other.

Fox River Paper Corp. v. *United States*, 165 F. 2d 639, 640 (1948), where the court said: "We consider only the evidence that supports the court's finding. We do not weigh the evidence or resolve any conflicts therein, or consider here the credibility of the witnesses."

Central Ry. Signal Co. v. *Longdon*, 194 F. 2d 310, 315 (1952), in which the Court said: "Even where there is no dispute about the facts, if different reasonable inferences may be fairly drawn from the evidence we are forbidden to disturb the findings based on such inferences unless they are clearly erroneous. • • • It matters not what our own judgment would have been [had we been the trial court] if there is substantial evidence most favorable to plaintiff [supporting the findings]."

The making of the proper finding from the *only* testimony as to the master's state of mind—his own

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the reasonable inferences of the court, to support the findings, we must accept them for what they are."

Eighth Circuit

United States v. *Gamble-Skogmo*, 91 F. 2d 372, 374 (1937), where in affirming a judgment for plaintiff in a tax refund case the Court said: "Where two different conclusions may honestly and reasonably be drawn from uncontroverted evidence, the question as to which inference shall be drawn is a question for the trial court to determine, and its finding will not be disturbed upon review."

Skelly Oil Co. v. *Holloway*, 171 F. 2d 670, 674 (1948), where in affirming a judgment for plaintiff in an action for a fire loss, the Court said: "The power of a trial court in a non-jury case, to decide doubtful issues of fact is not limited to deciding them correctly. On review, the question is not what finding of fact the trial court might have reached on the evidence before it, but whether there was substantial evidence upon which the finding which the Court made could properly be based."

Coleman v. *Sears, Roebuck & Co.*, 238 F. 2d 206, 210 (1956). No oral evidence was submitted, the case being tried on a stipulation of facts in accordance with a pre-trial conference. Judgment for the defendant was affirmed, the Court stating: "The stipulated facts do not include any concession that defendant was negligent. The question whether it was or was not negligent was submitted to be decided and was decided by the Court. The appellants are seeking a trial of the issue de novo, and in effect ask that this Court substitute its judgment for the judgment of the trial court on the issue of whether or not the defendant was guilty of negligence proximately causing the injuries suffered by them. Such is not this Court's function. (citing case) The primary consideration in applying the rule of res ipsa loquitur is whether the circumstances are such as to sustain an inference that the injury was the result of defendant's negligence. It affords merely an evidentiary element to be considered and weighed by the trier of the facts along with all the other evidence. (citing cases) Here the trial court having considered all the facts submitted to it decided that an inference that plaintiffs' injuries resulted from defendant's negligence was not justified and that, on the whole evidence, the defendant was entitled to judgment. We cannot say that reasonable minds could not so conclude, nor that the decision was clearly erroneous."

Ninth Circuit

Hanna Mfg. Co. v. *Hirsch & Sons*, 219 F. 2d 53, 55 (1955), [illegible] 70 L. ed. 553, in which the Court said: "This de

deposition—was the function solely of the District Court. The finding it made was neither impossible nor inherently improbable—indeed, it was the only finding which the District Court could make on the

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novo, which was formerly the rule in admiralty, ecclesiastical courts and in some chancery cases, is definitely abolished in civil cases in the federal courts by the rules constricting review. No authority is given except to District Courts to make original findings of fact. Presently our sole function as to such findings is to re-examine judicially, criticize and set aside if 'clearly erroneous'. The existence of the basis of fact in documentary form or in agreed statement of the parties does not translate such propositions into questions of law."

Tenth Circuit

Wunderlich Contracting Co. v. *United States*, 240 F. 2d 201, 203 (1957), cert. den. 353 U. S. 950, where, in affirming, the Court stated: "* * * if it is established by facts from which reasonable men might draw different inferences, appellate courts may not substitute their judgment for that of the trial court."

Federal Security Insurance Co. v. *Smith*, 259 F. 2d 294, 295 (1958), where, in affirming a judgment for an accounting of insurance brokerage commissions, the Court said: "* * * appellate courts are required to accept findings of fact if supported by substantial evidence and not clearly erroneous. (citing cases) Substantial evidence means more than a mere scintilla, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion (citing cases) 'If, from established facts, reasonable men might draw different inferences, appellate courts may not substitute their judgment for that of the trial court.'"

Walney v. *U. S.*, 178 F. 2d 880 (1950).

United States Court of Appeals for the District of Columbia

United States v. *Ingalls*, 114 F. 2d 839, 840, 842 (1940), where the Court stated: "* * * we must take as true all facts which the plaintiff's evidence tends to establish and draw in his favor all inferences fairly deducible from such facts. *Lumley* v. *U. S.*, 1934, 290 U. S. 551, 554; *Gunning* v. *Cooley*, 1930, 281 U. S. 90, 94 * * *. Even if it should be conceded that an inference might be drawn from the evidence different from that drawn by the trial court, that would not justify a reversal on appeal. Where two different conclusions may be drawn from conflicting evidence, the question as to which should be drawn is one for the trier of fact and not for an appellate tribunal."

evidence before it. No inference or presumption properly could be drawn that the dynamo shutdown and the surrounding circumstances furnished circumstantial evidence that the master took the admiralty's suggestion as an order, in the face of the direct testimony by the master that he did not. Certainly, the District Court's finding cannot be termed "clearly erroneous." *Central Ry. Signal Co.* v. *Longden*, supra p. 23n; *United States* v. *Ingalls*, supra p. 25n; *Wunderlich Contracting Co.* v. *United States*, supra p. 25n; *Zeddies* v. *C. I. R.*, supra p. 23n.

Even if it were the function of the Court of Appeals to make a new finding or to draw an ultimate inference from the evidence, it could base the same only on the master's testimony. If the Court found him unworthy of belief the record is left bare of any evidence as to the so-called "order" and its finding and inference rest on pure speculation.

This question applies to civil non-jury and admiralty suits alike. It is a question of public importance, for if findings of fact of a trial court based on uncontroverted evidence may be set aside and a contrary finding may be substituted by an appellate court merely because the only evidence is in a deposition, then the scope of review prescribed by Rule 52 (a) of the Rules of Civil Procedure is substantially altered. In order that there may be uniformity in the Circuits we respectfully submit that this is a question of importance which should be considered by this Court, along with question number I concerning electric ventilation.

III

The Court of Appeals may not both refuse to decide an issue and refuse to instruct the District Court to do so, when its new findings of fact and conclusions of law make such action necessary for a full and complete determination of the case.

Should this Court determine that the Court of Appeals was correct in its decision as to Questions I and II, that determination itself would call for the exercise of this Court's power of supervision of the lower courts, because neither Court below has determined the propriety of the stowage. This issue was ripe for decision in the District Court but because of its finding on ventilation it became unnecessary to decide it at that time. When the Court of Appeals reversed on the ventilation point, the unresolved issue of stowage again became ripe for decision. Relief was sought by petition for rehearing but this was denied without opinion.

In the District Court, petitioners urged that the stowage of the tobacco was improper for the long, hot voyage via Suez and the Cape of Good Hope, and that this fault was causally related to the damage. Having found that the shutting off of the electric ventilation was negligence in the care of the cargo which imposed liability on respondents, the District Court did not find it necessary to determine the point; though at several points in its opinion it impliedly criticized the stowage, saying:

"The testimony leads to the inevitable conclusion

that the tobacco was properly stowed in accordance with accepted practices then prevailing *for a trip via Gibraltar with the ventilation afforded through the medium of air intractors and extractors.* There remained, for a normal voyage, sufficient unused bale capacity indicating that the cargo was loosely stowed with air spaces permitting a reasonable amount of circulation to and from the holds." (A 14)

"* * * a cargo, stowed in a manner suitable *for a normal trip of 60 days in normal winter weather*, but requiring all available ventilating facilities and utmost care and diligence for a trip of 123 days under adverse conditions and warm weather." (A 17)

"What may have been normal stowage under normal atmospheric conditions with adequate ventilation, may quickly resolve itself into improper stowage under adverse weather conditions and a cessation of ventilation for long periods of time." (A 20) (Emphasis supplied)

The decisions of this Court, of the House of Lords, and of lower Courts establish that when unseaworthiness, including improper stowage, contributes with an error in management to cause damage to cargo, the legal cause is the unseaworthiness, and the carrier is liable.

The Isis, 290 U. S. 333;

Smith Hogg & Co. Ltd. v. *Black Sea & Baltic Gen'l Ins. Co. Ltd.*, 1940 A. C. 997;

The Elton, 49 F. 2d 709 (2 C. A.);

The Willowpool, 12 F. Supp. 96 (S. D. N. Y.

In *The Isis*, supra, the vessel sailed from Bremen, with a twist in her rudder which the exercise of due diligence before her sailing would have discovered. By reason of a combination of negligent navigation and the condition of the rudder, she stranded. This Court held that the statutory exemption against errors in management (the Harter Act) did not relieve the carrier from liability for resultant damage, nor entitle it to contribution in general average, because the unseaworthiness, not the error in management, was the legal cause of the loss (290 U. S. at pp. 346-349).

In *Smith Hogg & Co. Ltd.* v. *Black Sea & Baltic Gen'l. Ins. Co. Ltd.*, supra, the "Lilburn" was so negligently stowed that she was unstable, and hence unseaworthy, through lack of due diligence, on sailing. When she put in at a port en route for bunkers, her master committed negligent acts of management, and she sank. The House of Lords held that the exemption in the charter party against liability for errors in management did not excuse her owners from liability for the resultant damage.

Unless the record makes it abundantly clear that improper stowage could have played no part in the damage, therefore, it was incumbent upon the Court of Appeals to consider whether the stowage was negligent or to direct the District Court to do so; for if the stowage was improper, the respondent remained liable for the damage even if the shutting down of the electric ventilation was an error in management.

In *The Ioannis P. Goulandris*, 173 F. Supp. 140, affirmed July 19, 1960 (not yet reported), the District

Court for the Southern District of New York considered at length the matter of spontaneous heating of tobacco. It found (p. 151):

"The process which culminates in spontaneous ignition of tobacco consists of two phases. The first phase is a bacteriological or enzymatic process, of long duration, during which heat is evolved slowly; and if the heated tobacco is confined to such a degree that the rate of generation of the heat exceeds the rate of its dissipation, the temperature within the bulk rises. The temperature achieved by this process does not exceed the range of 130 to 150 F. The second phase is a process of chemical decomposition, of much shorter duration, during which the temperature rises rapidly; and if the heat is continued, this results ultimately in ignition if sufficient oxygen is present to permit that, or in reduction of the tobacco to a charcoal-like mass if there is insufficient oxygen present to permit actual ignition.

"During the first phase, tobacco sustains no damage, unless its subjection to the highest attained temperatures continues for a long period of time. The ignition temperature of tobacco is in excess of 350 F. Tobacco becomes of no commercial value for smoking purposes when subjected to temperatures exceeding 260 F. but below 350 F.

* * * *

"The less the height to which tobacco is stowed, the greater the length of time that is required for heat which develops spontaneously to reach a temperature which damages the tobacco. Spontaneous heating of tobacco is progressive and the

rate at which it develops increases with the passage of time."

In *The Nichiyo Maru*, 89 F. (2d) 539, the Court below considered heating damage to fish meal, and found:

> "* * * fish meal is an oily substance which is subject to heating and to spontaneous combustion unless properly ventilated and which, because of this propensity, requires that special care be exercised in storing it; that, although no standards had been developed at the time of these shipments for the proper stowage of cargoes of fish meal for voyages of this length, the importance of ventilation was recognized and the danger of stowing too large a quantity in a limited space with inadequate ventilation was well understood; that, notwithstanding this knowledge, the appellants stowed large quantities of the fish meal in the holds, piling it up to within a few feet of the decks, so that piles twenty-five feet or more in height were stacked up, almost completely filling the space available; and that it was the meal thus stowed in the holds that arrived in damaged condition, while that which had been stowed in the 'tweendecks, where the ventilation was better and the quantity stowed not so great, arrived in good condition, except as to a negligible quantity on only one of the vessels."

This is not the place to argue the impropriety of the "Anglyra's" stowage. Our point is simply that the question of its propriety is one which required decision, either by the Court below or by the District Court; and that the Court below neither decided it

nor required the District Court to do so. This omission, we submit, was error, and calls for corrective action by this Court.

In *Southwestern S. & M. Co.* v. *River Terminal Corp.*, 360 U. S. 411, 414, 415 (1959) this Court stated:

> "At the outset, we hold that the Court of Appeals erred in ordering what was in substance a referral of the issue of the validity of the exculpatory clause to the Commission without first passing on the other claims of error tendered by respondent below. As we have noted, those other claims, if accepted, would have required a reversal of the judgment of the District Court and the entry of judgment for respondent. The case had been fully argued before the Court of Appeals, and those claims were plainly ripe for decision.
>
> Under these circumstances, we think that sound and expeditious judicial administration should have led the Court of Appeals not to leave these issues undecided * * *".

See also:

Fox v. *Gulf Refining Co.*, 295 U. S. 75, 76 (1935);

Guaranty Trust Co. v. *U. S.*, 304 U. S. 126, 144 (1938).

We submit that the proper action to have been taken by the Court below was the course followed by the Third Circuit in *International* v. *Warren*, 248 F. (2d) 696, 704 (1957), cert. dism. 355 U. S. 943.

where, on a petition for rehearing following a reversal, the Court said: "Our opinion was not intended to foreclose the right of defendant Warren to raise any appropriate issue which the district court did not resolve because of its prior disposition of the case."

The question is of general importance and affects not only admiralty but also civil cases in which the reviewing court, in reversing, leaves other issues undecided which are ripe for decision, either by it or by the trial court. We submit that the suit should be remanded to the District Court with instructions to resolve the issue of stowage.

IV

When a Court of Appeals makes a new finding of fact which entitles litigants to a remedy under the pleadings, the Court of Appeals may not refuse to grant the remedy or to instruct the District Court to do so.

The District Court had found that the master's act in cutting off the dynamos constituted negligence in the care of the cargo. In reversing, the Court of Appeals found:

> "The purpose of cutting off the dynamos was to protect the vessel as a whole, the ship, her crew and her cargo, from enemy bombs and British gunfire." (App. 11.)

> "The Captain was not indifferent to the care of his cargo. He acted as he did, despite his con-

> sciousness of the desirability of continuous cargo ventilation because he thought the safety of the ship required it." (app. 12.)

That Court further found that ship and cargo were in imminent danger, and that most of her cargo ultimately sound. (app. 9, 3.)

These findings of the Court of Appeals state a classic case of general average:

1. An imminent peril common to ship and cargo.
2. A voluntary sacrifice by the master of part of the venture to preserve the rest.
3. Success in averting the peril.

The Jason, 225 U. S. 32, at pp. 48-9.

This was called to the attention of the Court below by petition for rehearing, with a prayer that the Court in its remand instruct the District Court to ascertain the contributions in general average due petitioners from respondents. The petition was denied, without opinion.

Recovery in general average may be decreed under a cargo damage libel.

Du Pont v. *Vance*, 19 How. 162, at p. 173.

If, contrary to our contention in Point I, the master's act in cutting off the dynamos was not negligent, but a voluntary sacrifice of part of the tobacco cargo to preserve the venture as a whole, then, we submit, the owners of the cargo sacrificed are entitled to contribution in general average from the vessel to make good their loss. The decision below, based

on a new finding by the Court of Appeals, coupled with its refusal to direct the District Court to compute the resulting contributions due petitioners, works substantial injustice.

Even if this Court agrees with the decision of the Court of Appeals that there was no negligence in the care of the cargo, it should not countenance that Court's refusal to grant petitioners the remedy to which its decision entitled them under the pleadings.

See:

Southwestern S. & M. Co. v. *River Terminal Corp.*, supra;
International v. *Warren*, supra.

The question is of general importance. Although it directly affects admiralty cases, in principle it affects all civil cases in which the reviewing court, in reversing the trial court, finds facts constituting a different cause of action but cognizable under the original pleadings.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted for the following reasons:

(1) As to Question I—whether the omission of electric ventilation constitutes negligence in the care of cargo or an error in management of the vessel—because of the conflict of decision between this Court, the Courts

of Appeals for the Second and Ninth Circuits, and the House of Lords on the one hand, and the Court of Appeals for the Fourth Circuit on the other circuit courts whose jurisdiction includes many of the busiest ports of the nation; because of the importance of the problem, due to the constantly increasing use of electric ventilation and refrigerating apparatus in the shipping trades; and because the substantive rights of shippers and carriers under a Federal Statute and an International Convention to which the United States has adhered should not be dependent upon the circuit in which the action happens to be brought;

II. As to Question II the scope of review of findings of fact by appellate courts because of the conflict of decision in suits in admiralty between this Court and the Courts of Appeals for the First, Fifth and Ninth Circuits on the one hand and the Court of Appeals for the Fourth Circuit on the other; because of the conflict of decision in civil suits involving Rule 52(a) of the Rules of Civil Procedure whose standards are now applied to suits in admiralty (*McAllister v. United States*, supra), between this Court, the Courts of Appeals for the First, Second, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and the District of Columbia Circuits on the one hand, and the Court of Appeals for the Fourth Circuit on the other; because the question is of public importance, for if findings of fact of a trial court based on uncontroverted evidence may be set aside and a contrary finding substituted by a reviewing court solely because

the evidence is in a deposition, the scope of review is materially changed from that prescribed by Rule 52 (a) and by decisions of this Court;

(III) As to Question III an unresolved issue raised in the District Court (stowage) because the state of the record calls for the exercise of this Court's power of supervision over the lower courts by remanding the case for further proceedings in the District Court, such issue being ripe for decision; and because the question is of general importance and affects all civil and admiralty cases in which by virtue of a reversal on other issues, a decision on other issues which might determine the action in favor of the losing party, is necessary and proper; and

(IV) As to Question IV a partially resolved issue (general average) because the state of the record calls for the exercise by this Court of its power of supervision, the Court of Appeals having made new findings of fact entitling petitioners to recover contribution in general average for the voluntary sacrifice of a part of their cargo in order to preserve the venture as a whole from imminent danger to both ships and cargo; because, on petition for rehearing, the Court refused to grant a remedy or to instruct the District Court to ascertain the sums due petitioners from respondents in general average contributions; and because the question is of general importance in all civil and admiralty cases in which a reviewing court, in reversing find-

facts constituting a different cause of action for which recovery may be had under the original pleadings.

Respectfully submitted.

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Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7931.

HELLENIC LINES LIMITED, respondent and claimant of the S. S. ANGHYRA, her engines, boilers, etc., and THE WEST OF ENGLAND STEAM SHIP OWNERS PROTECTION & INDEMNITY ASSOCIATION, LIMITED,

Appellants,

versus

BROWN & WILLIAMSON TOBACCO CORPORATION, Libellant LIGGETT & MYERS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO COMPANY, THE AMERICAN TOBACCO COMPANY and A. FANTIS, Intervening Libellants,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.
WALTER E. HOFFMAN, DISTRICT JUDGE.

(Argued November 4, 1959. Decided March 23, 1960.)

Before HAYNSWORTH and BOREMAN, Circuit Judges, and R. DORSEY WATKINS, District Judge.

James E. Freehill (Seawell, McCoy, Winston & Dalton; Jett, Sykes & Coupland; Hill, Betts & Nash;

Francis P. Kelly, Leon T. Seawell and R. Arthur Jett on brief) for Appellants; John W. R. Zisgen (Edward S. Ferebee and Bigham, Englar, Jones & Houston on brief) for Appellees The American Tobacco Company, R. J. Reynolds Tobacco Company, Liggett & Myers Tobacco Company and A. Fantis; and Stuart Sprague (Baird, Crenshaw & Lanning; Sprague & Peck, and Francis N. Crenshaw on brief) for Appellee Brown & Williamson Tobacco Corporation.

HAYNSWORTH, Circuit Judge:

The principal question is responsibility for heat damage to a cargo of tobacco shipped in 1940-1941 from Bulgarian, Turkish and Grecian ports via the Suez Canal and the Red Sea around the Cape of Good Hope to Newport News and Norfolk. The District Court placed responsibility upon the ship because of failure to operate ventilating fans during hours of darkness while the ship was at anchor, under black out regulations, at Port Said, the Grand Lake, Suez and Port Sudan.[1]

We are of the opinion that the failure to operate the fans, under the circumstances, was not a fault for which the ship is responsible. We do not consider, therefore, the several preliminary questions which occupied the attention of the District Court.

Aromatic, or "Turkish," tobacco, grown in Turkey, Bulgaria and Greece normally moves to the United States in the winter months via Gibraltar. In the fall

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[1] *Brown & Williamson Tobacco Corp. v. The S. S. Anghyra*, D. C., E. D. Va., 157 F. Supp. 737.

of 1940 that route was closed to Greek shipping. Germany had completed her conquest of Norway, Denmark, Belgium, The Netherlands and France, and was firmly in control of the mid-continent and in possession of bases on the Mediterranean Sea. On October 28, her ally, Italy, invaded Greece, and effectively closed the short, cool route via Gibraltar to Greek vessels.

In December, 1940, the Greek vessel, S. S. Anghyra, was moored at Thessaloniki (Salonica). She had been requisitioned as a troop carrier. At the behest of representatives of two American tobacco companies, she was released for the purpose of a voyage to the United States laden, principally, with tobacco and returning with war material. Most of her resulting cargo of tobacco outturned sound after a long, hot voyage around the Cape of Good Hope, the only route available or in contemplation, but some of the tobacco was entirely carbonized, and some partially damaged, by heat which had formed in pockets in each deep hold.[2]

American tobacco companies were substantially interested in 1939 crop "Turkish" tobacco stored in warehouses in Greece, Turkey and Bulgaria. Turkish tobacco, purchased by American tobacco companies, usually moved to the United States in the second winter after its harvest. Such tobacco, after its initial curing and its first summer's fermentation, with proper care, had its moisture content reduced to a

[2] No heat pockets developed in the 'tween decks. One shipment of Bulgarian tobacco stowed in No. 3 'tween deck aft outturned soft and moldy. It is claimed that this condition was the result of excessive heat. All other tobacco stowed in 'twgen decks spaces, none of it being Bulgarian, outturned sound.

level which permitted its safe transport to the United States during the cool months of the second winter via Gibraltar. The development of the war forced them to attempt shipment of cargoes susceptible to self-heating in hot weather, via Suez, twice crossing the equator.[3]

After loading tobacco in Thessaloniki, Burgas, Istanbul, Kavalla, and Piraeus, the Anghyra sailed from Piraeus on January 14, 1941. She was in convoy under the control of the British Admiralty. She arrived at Port Said on the 18th and remained there, awaiting a convoy, until the 28th.

On January 29th, after the second night at Port Said, the Anghyra's captain was summoned by the British Admiralty. He was told that a light had been seen aboard his vessel the night before and that it was

[3] After harvest, the planters of Turkish tobacco in Turkey, Greece and Bulgaria, string the leaves on poles and dry them in the sun. They are then packed in "village" bales and moved to warehouses. After some months, these bales are opened and the leaves processed to remove dust and foreign matter. The leaves are then rebaled.

During the next season of hot weather, the bales are stored in warehouses, well-ventilated, where they are turned and, if required, opened, to dissipate the heat they naturally generate as hot weather, over an extended period of time, causes fermentation.

In their second, even their third, exposure to extended summer's heat and humidity, such bales of tobacco will ferment again, and fermenting, will generate heat. The generated heat may be so intense that it results in spontaneous combustion. This actually occurred in two other cargoes of tobacco moving via Suez. *See American Tobacco Co. v. The Kalingo Hadjipatera*, D.C., S.D. N.Y., 81 F. Supp. 438, modified and affirmed, 2 Cir., 194 F. 2d 449; *American Tobacco Co. v. Goulandris*, D.C., S.D. N.Y., 174 F. Supp. 140.

In normal practice, bales of tobacco, exposed to a second season of heat, are regularly inspected and turned so that heat generated on the bottom side may be dissipated, and if necessary, the bales are broken open and aerated.

not to occur again. Air attacks were being mounted against targets in the area, and the British naval officers regarded the showing of a light with such concern they told the captain that British batteries would open fire on his ship if another light was seen aboard her. They suggested that he shut down his dynamos. The captain testified he explained the need to ventilate the cargo by using the ventilating fans, but he was told "cut off this dynamo and be quiet about this and avoid trouble," for the next time a light was shown he would be shelled.

The captain returned to his ship at 7:00 o'clock that evening. He ordered the dynamos to be stopped off. Thereafter, the dynamos were shut down, during the black out hours, 5:00 o'clock P. M. to 7:00 o'clock A. M., each night when the Anghyra was at anchor in a black out port. These included Port Said, the Grand Lake, Suez, Port Sudan and Mombasa. Altogether, the dynamos were shut down for 196 hours, and 168 of them accumulated on successive nights.

The Anghyra had served the citrus fruit trade. She was equipped with forced draft ventilation for each of her deep holds and 'tween decks spaces. Two ventilators to each space were equipped with electric fans, the pitch of the blades of one being in contrast to the pitch of the blades of the other. Thus, one ventilator to each space served as an intractor of fresh air while the other was an extractor of stale air. (No. 2 hold had two intractor ventilators and one extractor ventilator.)

The ship now asserts that operation of the ventilating fans could not have helped the situation, or, at least, that there is no evidence that failure to keep the

fans operating during the nighttime while at anchor in black out ports damaged the cargo. An agent of the owners, however, had instructed the captain to keep the fans in continuous operation and he believed their constant use was desirable, if not necessary, to guard against the propensity of the tobacco to self heat. The District Court found that this nighttime interruption of the operation of the fans "at least planted the seeds of damage" to the cargo. Since we conclude that the interruption was not a fault for which the ship is responsible, we may accept the finding without examination of the premises upon which it was based or the conclusions to which it led. It suffices to say that the District Court found no fault with the ship with respect to the major cargo, except that, which ordered by the British Admiralty to shut down the dynamos, which supplied power to the fans, during the nighttime in black out ports, the ship obeyed.

Cargo strenuously argues that the ship was not ordered formally to shut down the dynamos. It was only told that if a light was shown again, it would be sunk by British gunfire. The captain did say he was not ordered to shut down the dynamos, but that the naval officers pointed to that as the means of compliance with the orders that no light be shown. He testified that even "suggestions" from the men with the guns were received as orders.[4]

[4] Naval officers responsible for the safety of ships, crews, shore installations and shipping facilities, under actual attack in time of war, may seem indifferent to possible damage to a cargo of tobacco. Perhaps they were, but when the choice is between avoidance of speculative damage to a nonessential cargo and risk of destruction of ships, crews, installations and facilities vital to the war effort, the military preference is understandable.

Opinion of Court of Appeals

It is suggested that the captain could have removed all of the light bulbs. The captain testified he thought of doing that, but rejected it. Aside from the uncertainty that every light bulb aboard ship could be secured each night and placed beyond reach, the ship was required to be in readiness to get under way at all times. Such a state of readiness would not exist if all of the light bulbs were removed. Furthermore, two policemen aboard to guard against sabotage reminded the captain of the need of available lights if the ship was called upon to participate in rescue operations following an air raid.

Next, it is said that the captain could have shut off the lights in the forecastle by pulling one of the switches on the electric control panel and this would have cut off the power to only one of the ventilating fans. This procedure, however, would have left the current on in the crew's quarters aft, occupied by the engine-room personnel, the donkeyman, the steward and apprentices, in the officers' quarters, and in working spaces. There was as much reason to cut off the power to the crew's quarters aft as to those forward.

Before sailing from Piraeus, more than half of the ship's crew was conscripted into the Greek army. The captain was forced to accept replacements from the labor pool. Most of his crew was thus new and not of his selection.

One member of the crew, intentionally, or inadvertently, had permitted a light to be shown. The captain had been told forcefully to take steps to assure that a member of his crew did not again open a door inadvertently, or inadvertently leave a light on behind him when opening a door. The naval officer

had not temporized with him. Threatened with destruction of his ship and crew, it was no time for him to temporize with his crew or his cargo.

We think the orders of the British Admiralty required him to take steps which would assure certain compliance, not probable compliance, with the black out regulations. Certainty could be achieved only by cutting off the dynamos. That is what the Admiralty suggested, and under the circumstances, the captain not unreasonably took the suggestion as an order.[3]

The captain's action did not deprive the cargo of ventilation during the night hours in black out ports. It reduced the amount of ventilation when power to the fans was cut off, but air could still move through the ventilators. In an effort to compensate for the reduction of the amount of ventilation, the weather deck hatches were opened each night when the power was off. This may not have been the equivalent of forced draft ventilation, but it shows that the captain

[illegible]

was doing what he could to protect the cargo while complying with orders he was bound to obey.[6]

If now in the peace of a quiet chamber, fault might be found with the captain's decision, made when protection from recurrent air raids and imminent gunfire was of primary importance, the fault is one of man-

[6] Generally, the temperatures in Port Said and Suez were not extreme. During the Anglyra's stay the average daily maximum was 71 degrees, Fahrenheit; the average minimum, in the fifties. Temperatures were higher at Port Sudan, Mombasa and Durban, but the fans were operating when the ship, at sea and in other ports, encountered higher temperatures of longer duration than those experienced in the black out ports. Daily maximum and minimum temperatures, Fahrenheit, in the black out ports during the Anglyra's stay were:

Port	1940	Maximum	Minimum
Port Said	1 18	69.8	59.0
Port Said	1 19	66.2	50.0
Port Said	1 20	68.0	50.0
Port Said	1 21	69.8	51.8
Port Said	1 22	69.8	57.2
Port Said	1 23	71.6	59.0
Port Said	1 24	69.8	59.0
Port Said	1 25	73.4	59.0
Port Said	1 26	77.0	53.6
Port Said	1 27	80.6	55.4
Port Said	1 28		59.0
Suez	1 29		51.8
Suez	1 30	66.2	42.8
Suez	1 31	69.8	42.8
Suez	2 1		46.4
Port Sudan	2 5		73.4
Port Sudan	2 6	86.0	
Port Sudan	2 7	87.8	71.6
Port Sudan	2 8	84.2	75.2
Port Sudan	2 9	86.0	73.4
Port Sudan	2 10	78.8	66.2
Port Sudan	2 11	78.8	66.2
Port Sudan	2 12		62.6
Mombasa	2 27		
Mombasa	2 28	92.0	74.3
Durban	3 10	84.2	70.0
Durban	3 11	80.3	69.5

agement of the ship, for which neither the ship nor her owner is responsible under the Carriage of Goods by Sea Act.[7] Section 4(2)(a) exonerates the ship and her owners for damage caused by the neglect of the master in the navigation or in the management of the ship.[8]

Section 1304(2)(a) has no application unless the fault results in some damage to cargo. That some damage to cargo does result does not establish the character of the fault or show that it was a failure to properly care for cargo within the meaning of § 1303. We must look, not to the fact that cargo was damaged, but to the nature and purpose of the act which caused the damage.

Under the earlier Harter Act[9] and COGSA, the ship's liability turns upon the answer to the question whether the fault related primarily to the management of the ship or primarily to the care and handling of her cargo. As Mr. Justice Holmes put it:[10]

> "* * * If the primary purpose [of shifting ballast] is to affect the ballast of the ship, the change is management of the vessel; but if, as in view of the findings we must take to have been the case here, the primary purpose is to get the

[7] 46 USCA § 1300, et seq.

[8] 46 USCA § 1304(2)(a) provides:

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from

"(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."

[9] 46 USCA § 192.

[10] *The Germanic*, Ocean Steam Navigation Company v. Insurance Company of North America, 196 U. S. 589, 25 S. Ct. 317, 49 L. Ed. 610.

cargo ashore, the fact that it also affects the trim of the vessel does not make it the less a fault of the class which the first section removes from the operation of the third. We think it plain that a case may occur which, in different aspects, falls within both sections; and if this be true, the question which section is to govern must be determined by the primary nature and object of the acts which cause the loss."

The purpose in cutting off the dynamos was to protect the vessel as a whole, the ship, her crew and her cargo, from enemy bombs and British gunfire.

The dynamos provided the power to operate the motors of the ventilating fans; but they also supplied all of the other of the ship's needs of electric power. Power for the ventilating fans could not be maintained without maintaining power to living and working spaces and to other electrical equipment. Equipment used in communications, navigation, refrigeration and lighting was dependent upon the same dynamos. When the dynamos were cut off they stopped the operation of all of the ship's electric equipment and appliances, not just the ventilating fans.

It is said, however, that at anchor, in the black out ports, the primary purpose of the dynamos was the ventilation of the cargo. Proof of this is said to lie in the captain's protest to the naval officers that the dynamos were needed to operate the ship's refrigeration and ventilation equipment. The captain, however, did much more than turn off the ventilating fans, an act which would have served his purpose not at all; what he did was to cut off the source of light.

Similar efforts to overly particularize the act which causes the harm have not been successful in obscuring its purpose.[11] Had the dynamos been operated for the ventilation of the cargo, in operation they were a source of light, and the existence of a source of light was thought to threaten the safety of the ship.[12]

The captain was not indifferent to the care of his cargo. He acted as he did, despite his consciousness of the desirability of continuous cargo ventilation, because he thought the safety of the ship required it. Whether one may now say he was right or wrong, his purpose was the protection of his vessel from threatened danger. His acts in furtherance of that purpose cannot be the basis of liability for cargo damage under COGSA.[13]

We think the District Court was in error in holding the ship responsible for the heat damage to the tobacco.

After a rehearing in the District Court, a supplemental opinion was filed in which it was said that the ship might present further evidence in support of its defense of inherent vice in the tobacco. The interlocutory decree gave the ship the right, when the question of damages came on to be heard before a commis-

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[11] *Leon Bernstein Company* v. *Wilhelmsen*, 5 Cir., 232 F. 2d 771; *Ravenscroft* v. *United States*, 2 Cir., 88 F. 2d 418.

[12] *Ravenscroft* v. *United States*, footnote 9.

[13] See generally: *The Silvia*, 171 U. S. 462, 19 S. Ct. 7, 43 L. Ed. 241; *The Germanic (Oceanic Steam Navigation Company* v. *John W. Aitken)*, 196 U. S. 589, 25 S. Ct. 317, 49 L. Ed. 610; *Ravenscroft* v. *United States*, 2 Cir., 88 F. 2d 418; *Leon Bernstein Company* v. *Wilhelmsen*, 5 Cir., 232 F. 2d 771; *Isbrandtsen Co.* v. *Federal ins. Co.*, D. C. S. D. N. Y., 113 F. Supp. 357, aff'd. 2 Cir., 205 F. 2d 679; *Hershey Chocolate Corporation* v. *The Mars*, D. C. E. D. Pa., 172 F. Supp. 321.

sioner, to specify which bales it claimed were subject to inherent vice and, thereafter, to submit to the District Court any additional evidence it might have in support of that claim.

This rather novel procedure prompted this court to inquire into its own jurisdiction to hear the appeal.

All parties agree that the District Court did not intend that the general defense of inherent vice should be reopened. In the first opinion, the District Court found, contrary to the contentions of the ship, that the moisture content of the Bulgarian tobacco was not higher than that of the tobacco grown in Turkey and Greece and that the heat pockets developed because of the interruption in the ventilation, not because of excessive moisture in the tobacco. He had fully considered the contention that the fact that some bales self-heated while others did not showed inherent vice in those that did.

Everyone agrees that no one determined, by laboratory analysis, the moisture content of any bale of the tobacco. Tobacco men, who made random inspection of the Bulgarian tobacco with their senses of sight, touch and smell, estimated that its moisture content was approximately fifteen per cent. There was evidence to support a finding that a moisture content of fifteen per cent was within the range of tolerance for safe shipment via the short, cool Gibraltar route. The witnesses had no previous experience with the long, hot Suez route, but there was opinion evidence that the tobacco was in good condition, though no one denied that it was susceptible of self-heating when exposed to summer's heat.

Opinion of Court of Appeals

The parties had been engaged in marshalling evidence for more than fifteen years. The ship claims no new evidence to support its general defense of inherent vice, and we do not suppose this is what the District Court had in contemplation. We interpret the supplemental memorandum and the decree to permit additional evidence, if any, of inherent vice in specific bales, to the extent that may affect the question of the quantum of the damages, not the substantive rights and liabilities of the parties.

In his supplemental memorandum, appellate review of his interlocutory decree was foreseen by the District Judge. One so careful and experienced in admiralty cases as he would not have expected appellate review before the damages were ascertained if he had intended, generally, to reopen the question of the substantive rights of the parties.

We conclude the decree settled the substantive rights of the parties and is appealable under the statute.[11]

During loading, four bales of tobacco were dropped overboard, but were recovered. For the resulting water damage, the ship is clearly liable.

One of the libellants was the owner of a small shipment of olive oil in 5-gallon tins, packed in wooden crates. The Anghyra had taken on this olive oil in Piraeus, and had accepted it as in apparently sound condition. When it was unloaded, the wooden crates were intact, but some of the wood of the crates had been saturated by leaking olive oil. When the crates

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[11] 28 USCA § 1292 a.

were opened, some of the tins were found dented or buckled. Olive oil had escaped from opened seams.

The ship sought exoneration by suggesting that the damage might have been caused by rough weather the ship had encountered, but the District Court properly held that the ship had not proved that the damage was not the result of rough handling.[15]

Affirmed in part,
Reversed in part, and
Remanded.

[15] *American Tobacco Co. v. The Katingo Hadjipateraki*, 2 Cir., 151 F. 2d 449

Decree of Court of Appeals

Filed and Entered March 23, 1960.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7931.

HELLENIC LINES LIMITED, respondent and claimant of the S. S. ANGHYRA, her engines, boilers, etc., and THE WEST OF ENGLAND STEAM SHIP OWNERS PROTECTION & INDEMNITY ASSOCIATION LIMITED,

Appellants,

vs.

BROWN & WILLIAMSON TOBACCO CORPORATION, Libellant, LIGGETT & MYERS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO COMPANY, THE AMERICAN TOBACCO COMPANY and A. FANTIS, Intervening Libellants,

Appellees.

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court appealed from, in

Decree of Court of Appeals

this cause, be, and the same is hereby, affirmed in part and reversed in part as set forth in the opinion of the Court filed herein; that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Norfolk, for further proceedings in accordance with the opinion of this Court; and that the costs on appeal be paid by the appellees.

March 23, 1960.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge.

Order of Court of Appeals Denying Petition for Rehearing

Filed and Entered May 30, 1960.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7931.

HELLENIC LINES LIMITED, respondent and claimant of the S. S. ANGHYRA, her engines, boilers, etc., and THE WEST OF ENGLAND STEAM SHIP OWNERS PROTECTION & INDEMNITY ASSOCIATION, LIMITED,

Appellants,

versus

BROWN & WILLIAMSON TOBACCO CORPORATION, Libellant, LIGGETT & MYERS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO COMPANY, THE AMERICAN TOBACCO COMPANY and A. FANTIS, Intervening Libellants,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.

WALTER E. HOFFMAN, DISTRICT JUDGE.

ORDER

The Court having heretofore on March 23, 1960 entered its judgment and filed an opinion in the above

Order of Court of Appeals Denying Petition for Rehearing.

entitled case and a petition for rehearing having been filed on May 6, 1960;

Now, Therefore, upon consideration of the petition for rehearing,

It is ordered that the petition for rehearing be, and the same hereby is, denied.

Clement F. Haynsworth, Jr.
United States Circuit Judge

Herbert S. Boreman
United States Circuit Judge

R. Dorsey Watkins
United States District Judge.

May 24, 1960

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 348

BROWN & WILLIAMSON TOBACCO CORPORATION, LIGGETT & MYERS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO COMPANY and THE AMERICAN TOBACCO COMPANY,

Petitioners,

v.

HELLENIC LINES LIMITED, respondent and claimant of the S.S. ANGHYRA, her engines, boilers, etc., and WEST OF ENGLAND STEAMSHIP OWNERS PROTECTION & INDEMNITY ASSOCIATION, LIMITED,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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(b) The second question presented (Point II, pp. 16-26) does not arise if the court below was correct in holding, as a matter of law, that shutting down the dynamo was an act done for the safety of the ship and therefore in the management of the vessel; for the consequences of which the carrier was exempted from liability. In any event, the effect of the British Admiralty order upon the mind of the master whose testimony was given in a deposition was a matter of ultimate or legal inference, which the Court of Appeals was equally capable with the District Court of drawing 11

(c) The third question presented (Point III, pp. 27-33) does not arise, for, contrary to peti-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

BROWN & WILLIAMSON TOBACCO CORPORATION, LIGGETT & MYERS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO COMPANY and THE AMERICAN TOBACCO COMPANY,

Petitioners,

v.

HELLENIC LINES LIMITED, respondent and claimant of the S.S. ANGHYRA, her engines, boilers, etc., and WEST OF ENGLAND STEAMSHIP OWNERS PROTECTION & INDEMNITY ASSOCIATION, LIMITED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

The Questions Presented

Contrary to the impression sought to be created in the petition, the Court of Appeals did not decide any question of law in conflict with the decisions of this Court or any other Circuit. We urge denial because the contentions

made are specious and because the case does not involve any principle of law of importance to the public. Further, this litigation ought now to be terminated, having already endured for some nineteen years.

Statement

(a) Background

In December 1940, Germany had completed her conquest of many countries on the Continent and was in possession of bases on the Mediterranean Sea. Since her ally, Italy, had invaded Greece, it was then impossible to ship Turkish leaf tobacco grown in Turkey, Bulgaria and Greece to the United States via Gibraltar. In normal times, such shipments were always made by that route in the cool months because tobacco is "susceptible to self-heating in hot weather" (app. 3-4).* As petitioners were already committed to take large quantities of this tobacco, all efforts were made to induce the Greek Government to release ships to carry it to this country via Suez, the Red Sea and the Cape of Good Hope. Thus, at the behest of two of the petitioners, the Greek Government released the S.S. Anghyra from requisition as a troop carrier for the purpose of making a voyage to the United States via Suez with tobacco and returning with war materials (app. 3). This was an unprecedented voyage for leaf tobacco, involving considerable risk because of its inherent nature and the extreme heat encountered in twice crossing the equator (A. 10). The petitioners preferred to take this risk rather than leave their tobacco abroad and suffer the loss of their investment (A. 4).

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* The letters "app." refer to the appendix to the petition, consisting of the opinion of the Court of Appeals. The letter "A" is used to designate the "Appendix to Brief for Appellants" (white cover) filed in the court below.

Before sailing from Piraeus, the last loading port, a majority of the crew was conscripted into military service and the captain was forced to accept replacements from a labor pool. Most of his crew were thus new and not of his selection (A. 9, app. 7). The vessel was required to sail in convoy and at all times was under the control of the British Admiralty (app. 4). While in the Suez Canal, where blackout regulations were in force, the vessel was under aerial attack at night from enemy airplanes, and a vessel behind her in convoy had been torpedoed (A. 64-65).

Thus, the *mise en scène* of this lawsuit had been fully laid.

(b) The Essential Facts

As was observed by the Court of Appeals, the trial court found no fault with the ship, except when the captain shut down the dynamo during nighttime in blackout ports to enforce compliance with the orders of the British Admiralty (app. 6). Since the reversal was upon the ground that the captain was not negligent in shutting down the dynamo because the safety of the ship was threatened by enemy air raids and imminent gunfire, and that, even if the captain was at fault, it was an error in the management of the ship, for the consequence of which her owners were exempted under the Carriage of Goods by Sea Act, we shall only advert to those facts that support the correctness of this conclusion.

The dynamo supplied all of the ship's needs for electricity, including power to operate the motors that turned the fans in the cargo ventilators (app. 11). Power for these fans could not be maintained without making electric power available for lights in the crew's quarters, both in the forward and after parts of the ship, as well as equip-

ment used for communications, refrigerators and other electric appliances (app. 11).

Enemy air attacks had been mounted against ships and other targets in the area of the Suez Canal, which made it necessary to strictly enforce the blackout regulations (app. 5; 64-5).

When the ship was at Port Said, on a stand-by basis awaiting the formation of a convoy, the captain was summoned by the British Admiralty. He was told that a light had been seen on his vessel the night before and that if it occurred again British batteries would open fire on his ship (app. 4-5).

Although there were two policemen on the vessel to guard against sabotage, it was assumed that the light was exposed by a member of the crew (app. 7). Most of the crew were new because a majority of the original crew had been conscripted into military service at Piraeus and the captain was forced to accept replacements from a labor pool (A. 9; app. 1). When the captain told the British Naval officers that he was using his dynamo to supply current to his refrigerators and cargo ventilator fans, they told him, "Cut off this dynamo and be quiet about this and avoid trouble", for if a light were again shown "they would shoot the light from the batteries" (Resp. Ex. 10,* pp. 762, 765-6). While the captain did not say that he was ordered to shut down the dynamo, he testified that this means of compliance had been pointed out to him by the British Naval officers and that he regarded their suggestions "as orders" (app. 6).

Before shutting down the dynamo, the captain considered removing all light bulbs but was ordered by the anti-sabotage policemen on board not to do so. They told

* Respondents' Exhibit 10 is the deposition of the Captain and Chief Engineer.

him it might be necessary to use the lights to rescue any men from the sea during an air raid, and accordingly instructed him to keep a watch on the dynamo (Resp. Ex. 10, p. 763; app. 7). Power could not be cut off to the lights in all of the crew's quarters, located in the forward and the after parts of the ship, and at the same time maintain power for the cargo fans (app. 7; Resp. Ex. 10, pp. 897-907).

During the nighttime hours, when the dynamo was shut down cutting off power to the fans, the ventilators were kept open as well as the weather deck hatches (app. 8, 12). Thus, air could move through the ventilators and through the open weather deck hatches. Petitioners' principal witness, Captain Evanson, a former master, admitted that "opening the weather deck hatches helps considerably" in "getting air into" the holds (A. 236). This witness also admitted that "at nighttime, when the sun goes down and cools off, it wouldn't make much difference whether you worked your fans or not" (A. 236). The temperature records at the blackout ports during the period the dynamo was shut down reveal that the heat was not extreme, and that the drop in temperature ranged between about 12° to as much as 20° on the average (app. 9).

The trial judge expressly found "that no witnesses testified that the cargo suffered any damage because the fans were not in operation during blackout hours" (A. 17). Despite this finding, the trial judge nevertheless made a contrary finding "that damage resulted" during those blackout hours (A. 18). This was pure conjecture. The Court of Appeals accepted this finding without examination of the premises upon which it was based, for the expressed reason that the interruption of the operation of the fans at night "was not a fault for which the ship is responsible" (app. 6).

(c) The Opinion of the Court of Appeals

The Court of Appeals held that under the factual circumstances the captain was fully warranted in cutting off the dynamo to enforce certain compliance with the blackout regulations and to avoid threatened destruction of the ship and crew, that he did not act unreasonably in taking the suggestion of the British Naval officers as an order, and that even if any fault might be found with his decision, the fault was one of management of the ship, for which neither the ship nor her owner could be held liable under the Carriage of Goods by Sea Act. In reaching this conclusion, the Court stated (app. 7-8, 9-10, 10-11, 12):

> "One member of the crew intentionally, or inadvertently, had permitted a light to be shown. The captain had been told forcefully to take steps to assure that a member of his crew did not again open a door inadvertently, or inadvertently leave a light on behind him when opening a door. The naval officers had not temporized with him. Threatened with destruction of his ship and crew, it was no time for him to temporize with his crew or his cargo.
>
> "We think the orders of the British Admiralty required him to take steps which would assure certain compliance, not probably compliance, with the black out regulations. Certainty could be achieved only by cutting off the dynamos. That is what the Admiralty suggested, and under the circumstances, the captain not unreasonably took the suggestion as an order.
>
> • • •
>
> "If now in the peace of a quiet chamber, fault might be found with the captain's decision, made when protection from recurrent air raids and imminent gunfire was of primary importance, the fault is one of management of the ship, for which neither the ship nor her owner is responsible under the

Carriage of Goods by Sea Act. Section 4(2)(a) exonerates the ship and her owners for damage caused by neglect of the master in the navigation or in the management of the ship.

* * *

"Under the earlier Harter Act and COGSA, the ship's liability turns upon the answer to the question whether the fault related primarily to the management of the ship or primarily to the care and handling of her cargo.' As Mr. Justice Holmes put it:

> '... * * If the primary purpose [of shifting ballast] is to affect the ballast of the ship, the change is management of the vessel; but if, as in view of the findings we must take to have been the case here, the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not make it the less a fault of the class which the first section removes from the operation of the third. We think it plain that a case may occur which, in different aspects, falls within both sections; and if this be true, the question which section is to govern must be determined by the primary nature and object of the acts which cause the loss.'

"The purpose in cutting off the dynamos was to protect the vessel as a whole, the ship, her crew and her cargo, from enemy bombs and British gunfire.

* * *

"The captain was not indifferent to the care of his cargo. He acted as he did, despite his consciousness of the desirability of continuous cargo ventilation, because he thought the safety of the ship required it. Whether one may now say he was right or wrong, his purpose was the protection of his vessel from threatened danger. His acts in furtherance of that purpose cannot be the basis of liability for cargo damage under COGSA."

Reasons for Rejecting the Petition

(a) The first question presented by the petitioners (Point I, pp. 10-15) emasculates the decision of the Court of Appeals to create an erroneous impression that it is in conflict with a decision of this Court and decisions of Courts of Appeal of other Circuits.

The Court of Appeals made it patently clear that *the primary purpose* in cutting off the dynamo at night in the blackout ports was to protect the vessel as a whole from enemy bombs and threatened gunfire by the British authorities and that "If now in the peace of a quiet chamber, fault might be found with the captain's decision", it was an error in management of the vessel, for which neither the ship nor her owner was legally responsible under the Carriage of Goods by Sea Act. Nowhere in the opinion or record is there any finding or evidence that the primary purpose of shutting down the dynamo was done at all in connection with the cargo. Its primary purpose was the safety of the ship, her crew and cargo and accordingly was an act performed in the management of the vessel.

The decision of the court below on this question of law adopted the "primary purpose" rule enunciated by Mr. Justice Holmes in *The Germanic*, 196 U. S. 589 (1904), which has been followed by the Court of Appeal of other circuits.

In *Bernstein Co. v. M/S Titania*, 1955 A.M.C. 2040, aff'd. 232 F. 2d 771 (C.A. 5), it was necessary, because of heavy weather, to fill the empty deep tanks with sea water ballast for better trim of the vessel. In the course of doing so, a member of the crew negligently left off a

manhole cover of one of the deep tanks of a cargo hold, so that he might visually check the height of the water, with the result that the water flowed over the tank top and damaged the cargo. This negligent act was held to be an error in management of the vessel, since the primary nature and object of the act which caused the loss was the general care and safety of the whole vessel.

In *Raccoccetti* v. *United States*, 88 F. 2d 118 (C. A. 2), cert. den. 301 U. S. 707, the master erroneously believed that cotton in one of the vessel's holds was smoldering from a fire. The master ordered the cotton to be washed down. Although there was in fact no fire, the vessel owner was relieved from liability for the consequent damage because the primary purpose of the negligent act was "an effort to save the ship from what seemed to be impending disaster from fire", and therefore "primarily as a part of the management of the ship".

The uncontradicted evidence was, as found by the court below, that during the blackout hours the cargo was not deprived of ventilation for the ventilators were kept open permitting air to move through them, and that to compensate for any reduction in ventilation the weather deck hatches were opened each night (app. 6). Petitioners' principal expert admitted that opening these hatches helped considerably in getting air into the holds and that it didn't "make much difference" whether the fans were working at night when "the sun goes down" and "cools off" as it did in the blackout ports (A. 236). Thus the court below properly concluded that the captain, in keeping the weather deck hatches opened at night, demonstrated that he "was doing what he could to protect the cargo while complying with orders he was bound to obey" (app. 8-9).

PETITIONERS' AUTHORITIES ARE INAPPOSITE

An analysis of the decisions cited and discussed by petitioners, such as *The Vallescura*, 293 U. S. 296, reveal that they deal with acts done by a captain solely in the care and custody of cargo and that such acts had utterly nothing to do with navigation or management of a vessel or her safety.

In *The Vallescura* case, 43 F. (2d) 247; 293 U. S. 296, the cargo ventilators and hatches were at all times closed at night even in good weather. Since such act related solely to the care and custody of the cargo and had nothing to do with the safety of the vessel, this Court properly concluded that the negligent act did not concern the management of the vessel.

In *The Naples Maru*, 106 F. (2d) 32 (2 Cir.), the bowls of the ventilators were removed without excuse. This negligent act was held to relate solely to the care of the cargo rather than to management of the ship.

In the above cases, as well as the others cited by petitioners, the negligent act related primarily, and indeed exclusively, to the cargo, and therefore was not an act of management of the vessel. In none of those cases was the primary purpose of the negligent act to save or protect the vessel. This distinction is made clear in the decision of this Court in *The Germanic*, *supra*, but has been entirely overlooked or ignored by petitioners.

(b) The second question presented (Point II, pp. 16-26) does not arise if the court below was correct in holding, as a matter of law, that shutting down the dynamo was an act done for the safety of the ship and therefore in the management of the vessel, for the consequences of which the carrier was exempted from liability. In any event, the effect of the British Admiralty order upon the mind of the master whose testimony was given in a deposition was a matter of ultimate or legal inference, which the Court of Appeals was equally capable with the District Court of drawing.

The "clearly erroneous" rule is primarily intended to protect only a finding of fact made from conflicting testimony where the trial court has had an opportunity to observe the demeanor of the witnesses. Where a finding results from an inference based upon the possible effect of an event such as a military order upon the mind of a captain, the Court of Appeals is free to draw its own conclusion.

Moreover, negligence is a conclusion of law which the Court of Appeals may review free of the impact of this rule. See *Virbeck* v. *Black Diamond Steamship Corp.* (2 Cir.) 269 F. (2d) 68, 70; cert. den. 361 U. S. 934; *Aetna Casualty & Surety Co.* v. *De Maison* (3 Cir.) 213 F. (2d) 826, 829. *River Terminal Corp.* v. *Southwestern Sugar and Molasses Co., Inc.*, 274 Fed. (2) 36, 37.

The Petition for Certiorari in this matter takes vehement and lengthy (pp. 16-26) exception to the following passage in the opinion of the Court of Appeals for the Fourth Circuit (App. 8):

> "We think the orders of the British Admiralty required him [the master] to take steps which would assure certain compliance, not probable com-

> pliance, with the black out regulations. Certainty could be achieved only by cutting off the dynamos. That is what the Admiralty suggested, and under the circumstances, the captain not unreasonably took the suggestion as an order."

To this passage the Court appended the following footnote, citing cases in support of its position:

> "Our statement of facts is taken, largely, from the findings of the District Court. We differ with him only as to the ultimate inference to be drawn from the evidentiary facts; that is, whether, under the circumstances, the 'suggestion' of the Admiralty was an order with which the captain reasonably felt compelled to comply. It is appropriate to observe, however, that the evidence about the incident is in depositions, and that the scope of review of findings of fact is not as narrow as it would be if the District Court had seen and heard the witnesses."

The holding of the Court of Appeals, together with its supporting footnote, is amply justified by the precedents.

(1)

Rule 52(a) of the Federal Rules of Civil Procedure, the "clearly erroneous" rule, is heavily stressed by the petitioners herein, who seem to take comfort from it. The comfort is undeserved. The testimony relied upon by the District Court and by the petitioners as to the effect of the order, directive or "suggestion" of the British Admiralty was embodied in a deposition. Rule 52(a) is primarily and chiefly intended to protect only a finding of fact made from among conflicting testimony where the trial court has had an opportunity to observe the demeanor of the witnesses.

We start with the language of the rule itself. It states in pertinent part:

> "Findings of fact shall not be set aside unless clearly erroneous, *and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.*" (Italics ours.)

In *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394-5 (1948), Mr. Justice Reed interpreted Rule 52(a) in these terms:

> "It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice * * *. The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, *when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court.* The findings were never conclusive, however." (Italics ours.)

Similarly, in *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 341 (1949), Mr. Justice Jackson commented:

> "*Findings as to the design, motive, and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them.* If defendants' witnesses spoke the truth, the findings are admittedly justified. *The trial court listened to and observed* the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends." (Italics ours.)

Very much in point indeed is the opinion of the Ninth Circuit in *Stevenot* v. *Norberg*, 210 F.(2d) 615, 619 (1954):

> "Appellees argue that we are bound by the foregoing findings, since the record does not show that

> they are clearly erroneous. We do not think so. *When a finding is essentially one dealing with the effect of certain transactions or events rather than a finding which resolves disputed facts, an appellate court is not bound by the rule that findings shall not be set aside, unless clearly erroneous, but is free to draw its own conclusions.*" (Italics ours.)

Very recently, in *Skinner* v. *Parnell*, 257 F.(2d) 345, 346 (C.A. 10, 1958), the Court of Appeals for the Tenth Circuit held:

> "Since the testimony upon which the trial court has based the finding that Mrs. Skinner survived her husband was submitted by deposition this court is in as good a position as the trial judge to evaluate such testimony and the scope of review is enlarged to the extent, but only to the extent, that no regard need be given to the opportunity of the trial court to observe the witness."

The Seventh Circuit pithily showed its understanding of Rule 52(a) in *Wisconsin Memorial Park* v. *Commissioner*, 255 F.(2d) 751, 753 (1958), when it said:

> "Under Rule 52, Federal Rules of Civil Procedure, 28 U.S.C.A., *regard must be had for demeanor evidence* depending, of course, upon the significance of credibility in each case." (Italics ours.)

Professor Moore states (5 *Moore's Federal Practice*, Second Edition, Par. 52.04, p. 2637):

> "In *Carter Oil Co.* v. *McQuigg* [(CCA 7th 1940) 112 F. 2d 275] the court declared that a district court's findings of fact, where the testimony consists of documentary evidence and depositions, is 'subject to free review unaffected by presumptions which ordinarily accompany • • • findings on controverted issues.' *A number of courts likewise have*

> *hold that findings of fact based on documentary evidence, on uncontradicted testimony, on stipulated facts, on testimony taken by depositions, and in similar situations where credibility is not seriously involved or, if it is, where the receiving court is in just as good a position as the trial court to judge credibility, are not binding on the appellate court and will be given slight weight on appeal."* (Italics ours.)

In support of this proposition, Professor Moore cites cases from the First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth and District of Columbia Circuits.

Similarly, Professor Moore observes (5 *Moore's Federal Practice*, Second Edition, Par. 52.03, p. 2615):

> "In being 'well persuaded' [to reverse] it is pertinent to distinguish between demeanor testimony, if credibility is involved, for here the trial court has a decided advantage as Rule 52(a) recognizes, and documentary and other non-demeanor testimony where the appellate court has the same advantage in analyzing the testimony; and between primary inferences drawn from demeanor testimony, which the trial court is best capable of making, and secondary inferences drawn from primary inferences, which theoretically the appellate court is equally able to draw."

(2)

The effect of the order of the British Admiralty upon the mind of the master of the AXCHYRA was a matter of secondary or legal inference. The Court of Appeals is equally capable with the District Court of drawing the appropriate inference. Any inference drawn by the District Court did not go to the Court of Appeals freighted with, and protected by, the full rigor of the provisions of Rule 52(a).

In *Sears, Roebuck & Company* v. *Johnson*, 219 F.(2d) 590 (C.A. 3, 1955), the Court of Appeals held:

> "In disturbing a district court's finding of basic facts, this court is guided by the 'clearly erroneous' provision of Rule 52(a). But Rule 52(a) is not applicable where, as here, the dispute is not as to the basic facts, but as to what inference (i.e., ultimate fact) should reasonably be derived from the basic facts. This court, by examining the basic facts found by the district court, can determine, as advantageously as the district court can, whether or not an inference of likelihood of confusion is warranted."

This excerpt was approved and followed in *United States* v. *One 1950 Buick Sedan*, 231 F.(2d) 219 (C.A. 3, 1956).

In *Galena Oaks Corporation* v. *Scofield*, 218 F.(2d) 217, 219 (1954), the Fifth Circuit held as follows:

> "It is also true, however, that the burden of showing a finding of fact 'clearly erroneous' is not a measure of exact and uniform weight * * *. The burden is especially strong when the trial court has had the opportunity, not possessed by the appellate court, to see and hear the witnesses, to observe their demeanor on the stand, and thereby the better to judge of their credibility * * *. *The burden is lighter, much lighter, when we consider logical inferences drawn from undisputed facts or from documents, though the 'clearly erroneous' rule is still applicable* * * *. *Insofar, however, as the so-called 'ultimate fact' is simply the result reached by processes of legal reasoning from, or the interpretation of the legal significance of, the evidentiary facts, it is subject to review free of the restraining impact of 'the so-called "clearly erroneous" rule.'*" (Italics ours.)

Similarly, in *Lehmann* v. *Acheson*, 206 F.(2d) 592, 594 (1953), the Third Circuit held:

> "The District Court found as a fact that expatriation had taken place. With respect to that finding it must immediately be noted that it was in the nature of an ultimate finding of fact and on that score it is well settled that such a finding is but a legal inference from other facts and as such is subject to review free of the restraining impact of the so-called 'clearly erroneous' rule applicable to ordinary findings of fact by the trial court."

(c) The third question presented (Point III, pp. 27-33) does not arise, for, contrary to petitioners' contention, the District Court found that the cargo was stowed in accordance with the custom and usage in the trade.

The District Court found no fault with the ship, except in respect to the shutting down of the dynamo at night to enforce compliance with the orders of the British Admiralty. This was noted by the court below (app. 6). There can be no doubt about this, for the District Judge, on rehearing, stated (A. 311):

> "The Court: As I indicated in my opinion, but perhaps in a very awkward manner, what turned me on this case was the cutting off of the dynamo."

Petitioners attempt to give the impression that the District Judge left the issue of stowage undecided. However, the court expressly found that the method of stowage was customary and usual in the trade, as appears from the following portion of the opinion (A. 14):

> "With one exception[7] all witnesses stated that the

[7] The exception is Captain Evanson who testified that too much tobacco was stowed in the lower holds without a break or channel of space in the stow. But this witness does not contend that his own method of stowage is the accepted or general method employed."

'block stowage' system employed was customary in the usage of the trade. With respect to stowage, a similar method was held to be proper and customary in *American Tobacco Co.* v. *The Katingo*, 81 F. Supp. 438, 443, modified and affirmed 194 F. (2d) 449, certiorari denied 343 U. S. 978.*

The trial judge also noted that representatives of two of the petitioners were present at the loading ports to observe the stowage and that none of them registered any objection or offered any suggestion which, he said, "significantly points to an accepted procedure under normal conditions" (A. 15).

The District Court, in referring to the accepted practice in stowing cargo on trips via Gibralta, undoubtedly had in mind that this type of tobacco had never been shipped to the United States via Suez, prior to this voyage and certainly did not mean to imply that a different procedure was required to be followed in stowing the cargo via Suez than for a voyage via Gibralta.

(d) The last question presented (Point IV, pp. 33-35) does not arise as there was no voluntary sacrifice of the tobacco cargo.

This question was never raised by petitioners in the District Court. In any event, it is well settled that a case for general average does not exist unless there is a voluntary sacrifice of cargo, such as "a voluntary jettison" of cargo. *Barnard* v. *Adams*, 51 U. S. (10 How.) 270, at 303.

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* The tobacco on the KATINGO, which made a similar voyage via Suez with the same type of stowage, outturned from the No. 2 and No. 4 holds without any self-heating damage, except for a few bales in the top tiers.

There is utterly no evidence in this case that any of the tobacco cargo was sacrificed during the blackout periods when the dynamo was shut down. As heretofore mentioned, and as found by the court below, the captain took measures to see that the cargo was ventilated by keeping the ventilators and the weather deck hatches open. Moreover, petitioners' chief witness, Captain Evanson, testified that it was immaterial whether ventilator fans were operating at night when the temperature dropped, which it did at the blackout ports.

Thus, there is no proof that the captain permitted the tobacco to be voluntarily sacrificed during the period when he was taking appropriate action to enforce the blackout regulations and to safeguard his vessel from destruction. Although the trial judge erroneously assumed that some damage occurred during these periods, he expressly conceded that no witness had testified that the tobacco sustained any damage when the cargo fans were not in operation.

(e) The points raised are of no general importance.

For many years, the courts have rendered decisions construing the exemptions of a carrier's liability for errors or faults of a ship captain in the management of a vessel. The case thus does not present any question that is novel or unique, or of such general importance to warrant the Court in granting this petition. There is no conflict be-

tween the decisions of the different Circuits on any of the questions presented in the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 348

BROWN & WILLIAMSON TOBACCO CORPORATION, LIGGETT & MYERS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO COMPANY AND THE AMERICAN TOBACCO COMPANY,

Petitioners,

v.

HOLLAND LINES LIMITED, respondent and claimant of the S.S. "ANCHISES", her engines, boilers, etc., and West of England Shipowners Protection & Indemnity Association, Limited,

Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS

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IN THE

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No. 348

BROWN & WILLIAMSON TOBACCO CORPORATION, LIGGETT & MYERS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO COMPANY and THE AMERICAN TOBACCO COMPANY,

Petitioners,

v.

HELLENIC LINES LIMITED, respondent and claimant of the S. S. "ANGHYRA", her engines, boilers, etc., and WEST OF ENGLAND STEAMSHIP OWNERS PROTECTION & INDEMNITY ASSOCIATION, LIMITED,

Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS

1. Reply to Respondents' Point (a)—page 8 of their brief—Management

Respondents argue that because the immediate objective of shutting off the dynamo was not solely for the preservation of the cargo, the action taken constituted an error in management of the vessel—not negligence in the care of the cargo. They contend that the immediate object of doing an act always controls and that the cases cited by petitioners deal with acts related solely to the care of cargo, having nothing to

do with navigation or management of a vessel. That such assertions are incorrect is clear from the cases themselves. For example:

In *Gosse Millerd Ld.* v. *Canadian Govt. Merchant Marine* (1929) A.C. 223, the master left the hatches open to afford repairmen access to the holds to repair collision damage. Rain entered and damaged the cargo. The Court of Appeal, applying the test respondents suggest, held that the purpose of leaving the hatches open—for repairs—was an act of management, and exonerated the carrier. The House of Lords reversed, holding that the act of omission to keep the hatches or cargo covered was controlling and constituted negligence in care of cargo. (pet. 14, 15)

In *Foremans and Ellams Ld.* v. *Federal Steam Navigation Co.*, (1928) 2 K.B. 424; the engineer shut down one of the two refrigerating machines; his object was to use the steam the machine would have required to propel the ship, a matter of ship's management or navigation; the Kings Bench held that the act of omission to operate the second refrigeration machine was controlling and constituted negligence in care of cargo. (pet. 15)

In *Spencer Kellogg & Sons* v. *Great Lakes Transit Corp.* (E.D. Mich) 32 F. Supp. 520, the object of the officers in allowing water to remain in a fresh water line was to serve the crew, a matter of ship's management. The Court held the act of omission, in failing to turn off the line during freezing weather, resulting in damage to cargo, was controlling and constituted negligence in care of cargo. (pet. 14)

In *The Vallescura*, 293 U.S. 296, the object of closing the hatches and ventilators was to protect

the ship and her cargo during heavy weather; this Court; the Court of Appeals and the District Court agreed that the omission to reopen them to ventilate the cargo during fair weather was not an error in management or navigation but negligence in the care of the cargo. (pet. 12)

In *The Jean Bart*, 197 Fed. 1002, 1006 (D.C.), the captain kept the ventilators and hatches closed during long periods. His object was to protect the ship and her cargo during heavy weather. The Court held that the failure to properly use the ventilating equipment during good weather related to the cargo and was not an error in management or navigation. (approved in *The Vallescura*, pet. 12)

In *The Naples Maru*, 106 F. 2d 32 (2 Cir), the captain did not use the cowls of the ventilators but only the stumps. His object in doing so during periods of heavy gales was to protect both the ship and her cargo. As to other periods he claimed the weather was always threatening. The Court held that his act of omission in failing to replace the cowls when the weather permitted constituted negligence in care of cargo. (pet. 14)

In *The New York*, 29 F. 2d 26 (2 Cir.), the Court said:

> "Negligence relating to ventilating perishable cargo is a fault relating to the cargo alone, Skipton Castle, 243 Fed. 523 * * *" (pet. 13, 14)

Respondents discuss none of these authorities, except *The Vallescura* and *The Naples Maru*.

Instead they rely on *Bernstein Co.* v. *M S Titania*, 1955 A.M.C. 2040, aff'd. 232 F. 2d 771 (C.A. 5), which involved simply a ballasting operation. Errors in

such operations are uniformly held to constitute errors in management of the ship.

Respondents further rely on *Ravenscroft* v. *United States*, 88 F. 2d 418 (C.A. 2) cert. den. 301 U.S. 707, which involved a vessel under way. In the course of a series of catastrophies an additional instrumentality having nothing to do with cargo was brought into action, namely a fire hose and water, to avoid "what seemed to be impending disaster from fire". Under such circumstances the object of the wetting of the cotton cargo was held to be an act of management of the vessel.

Respondents further cite *The Germanic*, 196 U.S. 589 (1904). The Court held that the error in correcting the list of the ship during discharge of cargo was not an error in ship's management but negligence in care of cargo. In an opinion twenty-nine years later interpreting the same statute, in *The Vallescura*, supra, the Court held on the basis of *The Germanic*, supra, *Knott* v. *Botany Mills*, 179 U.S. 69, 73, 74 and *The Jean Bart*, supra, that omitting to ventilate cargo is not an error in management of the vessel but in care of cargo. The court in *The Jean Bart* had stated that its holding "upon principle finds support in *Knott* v. *Botany Mills* * * * (and) *The Germanic* * * *" (A 19). In *The Jean Bart*, supra, the court grounded its decision not on the statement in *The Germanic* as to "the primary nature and objects of the acts which cause the loss" but on the duty of the ship's officers and the purpose to which the duty relates. (A 19) *The Jean Bart* was adopted by this Court in *The Vallescura* as its sole ventilation authority.

2. Reply to Respondents' Point (b)—page 11 of their brief—Inferences

Respondents contend that Rule 52(a) of the Rules of Civil Procedure is primarily intended to protect only a finding made from conflicting testimony given in open court.

The decisions of this Court cited by respondents do not so hold. The cases cited at pages 20-25 of our petition establish the contrary. The "Notes of Advisory Committee on Rules" states that the rule applies to both uncontradicted and conflicting testimony. (Fed. Rules Civ. Proc., rule 52a, 28 U.S.C.A. page 15 of volume covering rules 52-58) The other authorities relied upon by respondents either support petitioners' position or are not opposed to it; or at most they emphasize the conflict of decision between the circuits.

The most that can be said of any of the Court of Appeals decisions cited by respondents is that a few state that findings of basic facts cannot be set aside unless clearly erroneous but that findings of ultimate facts founded upon such basic facts may be set aside even though not clearly erroneous. In the case at bar, the District Court's finding—"The British Admiralty did not order that the dynamo be cut off" (A 17) was a statement of a basic fact, not of ultimate fact; not only was it in substance what the captain said—"That was not orders to shut off the dynamos. * * * I decided myself" (A.A 86a, 88a) but it was almost precisely the form in which respondents' counsel summarized it on the trial record—"they did not order him to do so." (A 301)

Respondents' counsel have cited no authority to justify the reversal of a District Court finding of a basic fact founded on undisputed testimony in a deposition.

3. Reply to Respondents' Point (c)—page 17 of their brief—Stowage

Respondents argue that the District Judge did not leave the issue of stowage undecided, but in fact found that the cargo was stowed in accordance with the custom and usage in the trade. They ignore their own assignment of error, reading:

> "14. In that the Court failed to find and hold explicitly that at the inception of the voyage the stowage of the tobacco was proper for the voyage via Suez." (A 49)

4. Reply to Respondents' Point (d)—page 18 of their brief—General Average

Respondents argue that there is no evidence that any tobacco was sacrificed during the blackout periods. The District Court found on the evidence of the experts of both sides that "the conditions brought about by reason of the cessation of the night ventilation at least planted the seeds of damage". (A 17) This finding was not disturbed by the Court of Appeals.

CONCLUSION

Respondents have shown no sound reasons for rejecting the petition. For the reasons summarized at pages 35 to 38 of our petition, the petition should be granted.

Respectfully submitted,

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